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Summary record of the 2441st meeting
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Chairperson: Mr. Rivas Posada

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The meeting was called to order at 3.05 p.m.

General comments of the Committee (*continued*)

Draft general comment No. 32 on article 14 of the Covenant (*continued*) (CCPR/C/GC/32/CRP.1/Rev.4)

1. **The Chairperson** invited the Committee to resume its second reading of draft general comment No. 32 (CCPR/C/GC/32/CRP.1/Rev.4) on the right to equality before courts and tribunals and to fair trial, under article 14 of the Covenant.

Paragraph 15

2. **Mr. Kälin**, speaking as Rapporteur for the draft general comment on article 14, said that the new text simply clarified the former text and introduced no substantive issues.

3. **Mr. O'Flaherty** said that the second sentence of paragraph 15 was unclear, and should refer rather to varying criminal procedures that might apply in similar cases.

4. **Mr. Kälin** said that it was in fact preferable to speak of similar rather than particular cases. The point was that the same category of cases relating to the same offence could receive different treatment if there were reasonable grounds for doing so. The text should be modified accordingly in the three language versions (English, French and Spanish).

5. **Sir Nigel Rodley** proposed, since the category of case was the issue, that the sentence should be amended to read: "If, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in respect of certain categories of cases,[14] objective and reasonable grounds must be provided to justify the distinction.".

6. **Mr. Lallah** proposed adding the phrase "in the determination of" before the words "certain categories of case".

7. **The Chairperson** said he took it that the Committee wished to approve paragraph 15, as amended by Sir Nigel and Mr. Lallah.

8. *It was so decided.*

III. Fair and public hearings by a competent, independent and impartial tribunal

Paragraph 16

9. *Paragraph 16 was approved.*

Paragraphs 17 and 18

10. **Mr. O'Flaherty** proposed deleting the phrase "as is highlighted by its clear language," in the fourth sentence of paragraph 17, because article 14 did not necessarily highlight the point being made in that sentence, namely, instances in which article 14, paragraph 1, would not apply. Also, since the possibility of having a death sentence commuted — legitimately cited as one such instance — was a solemn matter, the text should avoid possibly giving the unfortunate impression that commutation was unworthy of article 14 protections. The examples given could be made more comprehensive and any such impression dispelled if the reader was referred to the later paragraphs in the general comment that discussed procedural rights.

11. **Mr. Kälin** agreed to the proposed deletion, and would also have no objection to including a reference to subsequent paragraphs. He observed that in the fourth sentence a distinction had to be made between the directly applicable right of access to a court under article 14, paragraph 1, and the procedural rights deriving from article 14. The text was saying that the core meaning of article 14 was limited to criminal charges heard in suits at law and setting that apart from whatever procedural rights must be guaranteed in other contexts, on which there was a rich jurisprudence. The Committee had come to realize in its consideration of various communications — those relating, for example, to extradition procedures — how problematic it would become if article 14 was said to apply in such cases.

12. **Mr. Iwasawa** corroborated the fact that in its consideration of communications, the Committee had found that the concept of a suit of law did not apply to extradition cases or to deportation proceedings.

13. **Ms. Wedgwood** observed that in the last sentence of paragraph 17, the phrase "in a position of administrative subordination" sounded very servile in English in the current day and age, and suggested finding a better formulation. Also, in the third sentence of the paragraph, the statement that the concept of a suit at law was based on the nature of the right in

question was not strictly true, because often a right was disposed of by administrative processes as well as by lawsuits, as the Committee had seen in dealing with its article 14 communications. She therefore suggested softening the assertion by changing "is based on" to "may be based on". Also, it might be best to avoid getting into the question of the "nature" of a right.

14. Categorical assertions should be avoided in such a tricky area. Thus, to state flatly in the fourth sentence — based on the Committee's jurisprudence thus far — that the examples given of instances in which article 14 did not apply could never constitute an entitlement was risky, since some entitlements could be created by a premise of the domestic legal system concerned. Such a sweeping statement could subsequently prove to be inaccurate when the Committee considered other communications.

15. **Ms. Chanet** suggested combining paragraphs 17 and 18. Rather than beginning — as in the fourth sentence of paragraph 17 — to enumerate the instances in which article 14, paragraph 1, did not apply, the text of paragraph 18, with the deletion of the initial phrase "On the other hand" and beginning with the words "The concept is broad" could become the fourth and fifth sentences of paragraph 17. They would then be followed by the negative examples in the fourth and fifth sentences of the current paragraph 17. That would be more logical and would also avoid the problems raised by Mr. O'Flaherty.

16. **The Chairperson**, speaking in his personal capacity, concurred, because it was not the usual legal style to begin with the negative statement of a concept.

17. **Mr. Kälin** said that to replace "is" by "may be" in the third sentence as suggested by Ms. Wedgwood would cast doubt on the Committee's well-established case law, and he preferred not to change the text. Also, he believed that the fourth sentence was clear but, perhaps, to satisfy Ms. Wedgwood, the phrase "according to domestic law" could be reversed with the following phrase, "the person concerned does not possess any entitlement".

18. Regarding the position of administrative subordination, that was an issue in the German administrative law tradition, which distinguished between citizens and subjects, the latter having no rights. As an idea, it was a helpful one to include, and he asked Ms. Wedgwood to accept that civil-law notion while perhaps finding a better expression for it in English. All members of the Committee knew that article 14 was problematic, and certainly that had been the feeling of the drafters of the European Convention on Human Rights. The task in paragraph 17 had been to take into account the different legal traditions.

19. For clarity, he suggested adding the following sentence at the end of paragraph 17: "This guarantee furthermore does not apply to extradition, expulsion and deportation procedures." That would be followed by a footnote citing the relevant communications.

20. He agreed with Ms. Chanet that the current paragraph 18 should become the fourth sentence of the current paragraph 17, to be followed by what were currently the fourth and fifth sentences of paragraph 17, beginning with the words "Article 14, paragraph 1, does not apply ...", and by the new sixth sentence he had just proposed.

21. **Mr. Lallah** said that he supported the rearrangement of paragraphs 17 and 18 as proposed. However, he objected to Ms. Wedgwood's suggestion to replace "is" by "may be" in the third sentence, because he would not like to see established jurisprudence reached after mature thinking overthrown in a general comment. Ms. Wedgwood could ask for a revision if in the future a case such as she envisaged came up.

22. On the other hand, he shared Ms. Wedgwood's concern over the notion of "administrative subordination". Despite the argument that the issue would be valid for some States parties to the Covenant, the Committee must look at the Covenant as it applied to all. The point might be acceptable in respect of the private sector, but certainly not the public sector, where the reference to civil servants involved the applicability of article 25 guarantees, as well as article 14, paragraph 1, guarantees, in the determination of violation of a right. Clearly, the Committee had a problem, and he was unable to propose a solution.

23. **Ms. Chanet** suggested replacing the words "administrative subordination" with "hierarchical structure", "hierarchical position" or "hierarchical power", expressions similar to those used in the English text of *Perterer v. Austria*. Nevertheless, based on the Committee's jurisprudence, a change of terminology would make no difference in the case of a disciplinary measure.

24. With respect to extradition, there seemed to be a consensus that a person subject to extradition was not an accused in the criminal sense under article 14, paragraph 1, and so article 14, paragraph 3, would not apply. In the *Everett* case cited by Mr. Kälin, it had been agreed that while an extradition order was not a criminal charge under article 14, paragraph 1, article 14, paragraph 1, could apply to an extradition ordered by a court and the court would have to be impartial. She urged Mr. Kälin to consider the Committee's decision in *Everett* in his drafting.

25. **Ms. Wedgwood** expressed concern that the reader could see the general comment either as a summing up of the Committee's jurisprudence or as a "Justinian Code" dictating what the law was. However, the Committee was not giving a snapshot of the law, but only expressing its authoritative reading of article 14.

26. As to whether the conclusion could be assumed on the basis of the nature of the right, that had been a subject of intense debate. For example, in American constitutional law, the traditional notion of property had always been limited to something like a cow, a house or land and the idea of welfare entitlements constituting property had been unthinkable. However, it had been later argued successfully that in a modern administrative society, welfare entitlements were of such fundamental value to the recipient's well-being that they were equivalent to real estate in the social system. Accordingly, people could agree on what the nature of the right in question meant at any given time, but that left little room for progressive interpretation. Therefore, such language would preclude any future claim of a non-traditional right as being one that deserved the full protection of article 14, paragraph 1.

27. **The Chairperson** said that it was difficult to reach a consensus because of the terms used and the different legal systems that were at play. However, a consensus was necessary to ensure that the general comment was not at odds with the Committee's jurisprudence.

28. **Mr. Kälin** said that it was impossible to use the *Perterer* language as proposed by Ms. Chanet, because the concept had been avoided altogether in that case. In *Perterer*, the Committee had ruled that if according to domestic law, the case had to be referred to a court, then that court had to be independent and impartial. However, the issue at hand was the right to have access to a court. According to the Committee's jurisprudence, if Government officials or civil servants did not have access to a court but only to an administrative body, then article 14 could not be invoked.

29. With regard to the nature of rights, the language used by bodies like the Committee had to be as compatible as possible with legal theory. The case law in that connection was not clear enough and the Committee was not bound by it. Thus, the Committee still had the possibility of determining what the nature of a specific claim was and whether that could provide access to a court or tribunal and not just an administrative body. He was comfortable with his proposals and welcomed comments from colleagues.

30. **Mr. O'Flaherty** suggested that when cases gave rise to certain principles, those cases should be referred to not so much as statements of principle applicable regardless of the facts, but as previous findings. It could be said, for example, that article 14, paragraph 1, had not applied in the case of promotions in the civil service or the appointment of judges, thus referring to a particular set of circumstances and not making a statement of principle.

31. **Mr. Iwasawa** suggested that the expression "administrative subordination" could be replaced with "administrative control".

32. **The Chairperson** proposed that paragraphs 17 and 18 should be set aside for the time being so that the members could work out their differences and come up with a consensus formulation.

33. *It was so decided.*

Paragraph 19

34. **Ms. Chanet** reminded Mr. Kälin that, for purposes of harmonization, the text no longer referred to the decision of legal matters in proceedings that were judicial in nature, but jurisdictional in nature, thereby covering administrative tribunals.

35. **Mr. O'Flaherty** asked whether the word "tribunal" had been defined elsewhere for purposes of the first sentence, because the first sentence referred generally to equality before courts and tribunals, whereas the second sentence referred to a particular type of tribunal — a fair, impartial and independent tribunal. He suggested that the earlier part of the text could be rewritten to include a broader definition that covered the meaning of the word "tribunal" as contained in the first sentence of the first paragraph.

36. **Mr. Kälin** said that he could not see any difference with respect to independence, because he did not think that it would be acceptable to have incompetent, dependent and partial tribunals that would only have to guarantee equality of arbitrariness. There was a difference only with regard to the kind of tribunal that had to be set up for criminal cases since administrative tribunals could not conceivably handle murder cases, for example. Nevertheless, that did not affect the inherent structure of the paragraph and so it was not necessary to define courts and tribunals in the first sentence.

37. **Mr. O'Flaherty** said that he was not suggesting the type of scenario described by Mr. Kälin. The problem was one of wording, because the first sentence referred to all matters before courts and tribunals, while the second sentence referred to criminal matters and suits at law and the definition of tribunal in paragraph 19 was specifically confined to that of article 14, paragraph 1. Dropping that precise designation would remove any further misunderstanding between Mr. Kälin and himself.

38. **The Chairperson** noted that Mr. Kälin had agreed with Mr. O'Flaherty's suggestion.

39. **Ms. Chanet** said that immunities were not the only exceptions from jurisdiction deriving from international law. For example, a court could be said to lack jurisdiction under an international convention because the jurisdiction was *ratione personae*, not *in rem*. Consequently, a court could lack jurisdiction because the accused was not in its territory, such lack of jurisdiction being derived from international law but being based on the principle of *ratione personae*. Perhaps "among other things" could be added at the end of the paragraph before "immunities", to show that there were other possible exceptions.

40. **Mr. Iwasawa** asked whether a suggestion Mr. Kälin had made on adding the sentence at the end on a separate sheet of paper had been approved.

41. **The Chairperson** said that he thought paragraph 19 had been approved following Ms. Chanet's proposals.

42. **Mr. Kälin** clarified that Mr. Iwasawa was referring to draft general comment No. 32, a document that had been distributed at the beginning of the second reading of the general comment seeking additional proposals of the Rapporteur based on submissions received after the deadline for comments. However, he felt that they did not add anything to the text and so had not included them.

43. **Mr. Amor** asked whether the end of paragraph 19 was sufficient to protect certain government acts because administrative and political acts had the protection of immunity in certain countries. He suggested adding that exception to the end of paragraph 19.

44. **Ms. Chanet** said that she saw no need for additions to the text referring to the nature of the acts, because the reference to jurisdictional proceedings as opposed to judicial proceedings was sufficient to cover administrative tribunals. Likewise, there was no need to add other acts to the list because that would have meant dealing with the content, whereas the paragraph was strictly concerned with the manner of judging, and with access to courts.

45. **The Chairperson** said he took it that the Committee wished to approve paragraph 19 as drafted, without the addition suggested by Ms. Chanet.

46. *It was so decided.*

Paragraph 20

47. **Mr. O'Flaherty** said the second sentence contained a closed list of requirements of independence, which involved issues generated by jurisprudence and only dealt with the role of the judge, not the independence and impartiality of tribunals. He suggested adding the words "among other things" or "inter alia" after "refers to". In addition, even though the penultimate sentence of the paragraph probably reflected the Committee's jurisprudence, it seemed incompatible with the situation in at least one State party where the judges of its highest court also sat in its highest legislative chamber.

48. **Mr. Shearer** said that Mr. O'Flaherty's suggestion to add "among other things" or "inter alia" in the second sentence was not entirely necessary because many examples were given on how the requirement of independence was affected by such things as the appointment of judges and the qualifications for appointment. Moreover, the reference to "actual independence" was sufficient to cover all the relevant factors.

49. With regard to the example of the House of Lords in the United Kingdom, the functions of the judiciary

and the executive were clearly distinguishable because the House of Lords represented the legislative branch and not the executive branch. Finally, he suggested that the sentence in square brackets should be maintained and the square brackets removed.

50. **Ms. Wedgwood** said that even though the Law Lords sat in the House of Lords, the House could not revisit or revise legal decisions. To resolve the issue, the text could refer to the independence of the judiciary from "political interference" by the executive branch and the legislature. With regard to the first sentence of the paragraph, it was true that there was no exception to the competence, independence and impartiality of courts and tribunals, but there were other exceptions under article 14, paragraph 1. To highlight the three qualities that were not subject to limitation, the sentence could be reworded to read: "The requirement of competence, independence and impartiality in a tribunal under article 14, paragraph 2, is an absolute right not subject to any exception".

51. **Mr. Amor** sought clarification about the manner of appointment of judges in the second sentence because it could be mistaken for the act of appointment itself, which was an administrative act. The text should refer to the conditions of appointment. Also, referring to the duration of their term could weaken the principle of tenure for the judiciary in certain countries. It would be more relevant to mention a guarantee as to the duration of their term, including that of elected judges. He felt that the part in square brackets was important but depended on each country's capabilities. The reference to remuneration in the middle of the paragraph was sufficient, making the last sentence irrelevant.

52. **Mr. Lallah** said that the paragraph needed reworking to avoid repetition. With reference to the manner of appointment of judges, Mr. Kälin was alluding to transparency of appointment by appropriate authorities. Concerning the duration of their term, he agreed with Mr. Amor that referring to the guarantees relating to their security of tenure would encompass not only the duration of their term but also their treatment. Consequently, the last sentence would be unnecessary. He suggested inserting references to those guarantees in the third line and deleting the final sentence in square brackets.

53. **Ms. Chanet** agreed with Mr. Amor and Mr. Lallah on the duration of the term, but said that it would be easier just to go by the Bangalore Principles of Judicial Conduct, which were very detailed and could provide harmonized language.

54. **Mr. O'Flaherty** supported Mr. Lallah on the last sentence because it had been decided the previous year to use a formulation such as "terms and conditions of service", for the reason given by Mr. Lallah and because many States were not able to pay commensurate remuneration. With reference to the second sentence, even though Mr. Shearer had not insisted on the list being closed, there were many scenarios missing from the list, including juries or the possible privatization of the judiciary. Nevertheless, the list should not be closed unless absolutely necessary.

55. **Mr. Bhagwati** agreed with Ms. Chanet that the Bangalore Principles were detailed and could be included in the paragraph to ensure independence and security of tenure. Remuneration might vary from one country to another, but security of tenure must be maintained in order to strengthen the formulation of judicial independence.

56. **Ms. Motoc** said that domestic and international systems of independence of the judiciary were very different. Concerning remuneration, she agreed that it should be maintained, even though some States paid their judges less than other civil servants.

57. **Ms. Chanet** said that the Bangalore Principles could get the Committee out of its predicament. With regard to remuneration, since certain countries paid their judges less than other top civil servants and ambassadors, the Committee should find a formulation to indicate that judges should not be underpaid when compared with other high-level officials in the country.

58. **The Chairperson** asked whether the word "tenure" in English had the same meaning as "*mandat*" in French and "*duración*" in Spanish, because in certain sectors "tenure" referred to something that was "for life".

59. **Mr. O'Flaherty** said that while he was fortunate to have the security of tenure, he would nevertheless have to leave his position at age 65. Therefore, the word did not necessarily mean "for life".

60. **Mr. Bhagwati** said that "tenure" meant only the term of office. It could be for life or until a person reached a specific age of retirement. Tenure could vary from country to country. In his country, tenure meant

up to the age of 65; in the United States of America, it could mean for life. The meaning of the word therefore depended on the country and its constitution.

61. **The Chairperson** asked whether the word "tenure" could be applied to a fixed term, for instance of ten years. That was not the case with respect to academic careers in the United States of America, for example, as tenure implied the entirety of a person's working life. The equivalent in Spanish or French could therefore not be used, as in various countries, judges could be appointed for terms which fell short of retirement.

62. **Ms. Motoc** said that she also had the impression that tenure covered a person's entire career. The French and Spanish equivalents did not convey the same idea.

63. **Ms. Wedgwood** said that while in American English, academic tenure suggested a position from which a person could not be removed, the tenure of a judge would depend on established practice. If a state court judge had a tenure term on an elected supreme court, tenure would mean the duration of his or her term. Tenure did not in itself carry the implication of a lifetime position when it was applied outside an academic setting.

64. **Mr. Lallah** said that "tenure" could be translated in French or Spanish in the way in which it was meant: the security of the office during a given mandate. As he had been among the drafters of the Bangalore Principles of Judicial Conduct (E/CN.4/2003/65, annex), he might be able to put forward some suggestions for amendments to the text drawing on the Principles.

65. **Mr. Kälin** said that he agreed with the proposal to amend the first sentence of paragraph 20 to read: "The requirement of competence, independence and impartiality of the tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception." He suggested that the second sentence should read: "The requirement of independence refers in particular to the procedure and qualifications for the appointment of judges and guarantees relating to their security of tenure ... ." He agreed with the proposal to insert the words "political interference" between "independence of the judiciary" and "from the executive branch and legislature" in the last part of that same sentence. Concerning the House of Lords, there was no problem, as the paragraph referred to functions and competences. When Law Lords sat as judges, they exercised judicial functions in the House of Lords. It was clear when they had judicial functions and when they were discussing a new law or criticizing the Prime Minister, for example. He was open to suggestions from those who had participated in the drafting of the Bangalore Principles to bring the language of the paragraph into line with those Principles. The Committee could return to paragraph 20 as soon as he received the relevant input. Lastly, as there was no consensus on the issue of remuneration referred to in the final sentence in square brackets, he proposed that the sentence should be deleted. He stood ready to hear any alternative proposals from those involved in drafting the Bangalore Principles.

66. **The Chairperson** suggested that as the text of the Bangalore Principles was not long, it might be incorporated into the draft general comment.

67. **Mr. Kälin** said that the length of the text depended on how it was formatted. In his version, it was four pages, which was too long to incorporate as such.

68. **Ms. Chanet** said the passages on competence, independence and impartiality in the Bangalore Principles did not amount to four pages. The Committee might therefore draw only on the relevant parts of the text, as appropriate.

69. **Mr. Bhagwati** said that he had been among the early drafters of the Principles. He concurred that the Bangalore Principles did not need to occupy much space, as many of them dealt with aspects of the judiciary which were not relevant to the current text. There were, however, a few principles which were of direct relevance and which would constitute no more than two pages.

70. **The Chairman** said that a page and a half to two pages of text might be too lengthy. Perhaps a synthesis would be helpful.

71. **Mr. Amor** said that the Committee should draw only on the relevant passages of the Principles. For his part, he had learned about the Principles only at the current meeting, and was therefore unaware of who had taken part in their drafting or the nature of the decisions reached. The Committee should adopt only principles which were firmly established, without linking them to any specific place such as Bangalore.

72. **The Chairperson** said that the proposal was not to reproduce the Principles but rather to use some

wording which might be appropriate for the issue of the remuneration of judges.

73. **Ms. Chanet** said that the Principles should not give rise to any problems, as they constituted United Nations principles. They had been recalled by the Economic and Social Council in resolution 2006/23 on strengthening basic principles of judicial conduct and constituted a set of principles like the Standard Minimum Rules for the Treatment of Prisoners. The Committee needed only to comment on the Principles.

74. **Mr. Kälin** proposed suspending discussion on paragraph 20. As he had not found any relevant passages on remuneration in the Principles, he was not ready to accept the idea of inserting the Principles in the text. He would need more time to study them in detail.

75. **Sir Nigel Rodley** said that the Committee might be able to find inspiration in the Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

76. **The Chairperson** took it that the Committee wished to approve the paragraph, pending final rewording of the sentence concerning remuneration.

77. *It was so decided.*

Paragraph 21

78. **Mr. O'Flaherty** said that he was unsure of whether the formulation of the first sentence captured the actual intent. He suggested the following wording: "Judges may be dismissed only for objectively established serious misconduct or incompetence."

79. **Ms. Wedgwood** wondered whether the word "dismissed" clearly indicated a dismissal during a term as opposed to non-renewal of a term. It was important to avoid any ambiguity, as there were many reasons for which judges might be dismissed at the end of a term, including his or her political affiliation.

80. **Mr. Glélé Ahanhanzo** said that in continental law the *statut de la magistrature* (regulations governing the judiciary) covered judges' appointments, code of conduct and terms in office. It was therefore difficult to speak of the expiry of a term for which a judge had been appointed. Wording might be found on the basis of the continental legal system to convey that idea.

81. **Ms. Motoc** said that she had problems with the use of the word "objectively" in the proposed revision to the first sentence. She would like to know what was meant by the term in the present context. It was unclear whether it implied explicit reasons established in writing for which judges could be dismissed.

82. **Sir Nigel Rodley** suggested that the first sentence should be amended to read: "Judges may be dismissed only on serious grounds of misconduct or incompetence in accordance with fair procedures, ensuring objectivity and impartiality set out in the constitution or law." Concerning the comment on the dismissal of judges owing to their political affiliation, the idea of renewable term limits for judges, especially when they were determined by anything other than an impartial judicial college, raised serious questions about the quality of fairness and independence of the judiciary in the jurisdiction in question. The Committee should not say anything that would give any legitimacy to systems which chose judges in that manner.

83. **The Chairperson** took it that the Committee wished to approve paragraph 21, as thus amended.

84. *It was so decided.*

Paragraph 22

85. **Mr. O'Flaherty** said that he was not comfortable with the notion that judges must be free of bias or prejudice. Everyone had biases. The issue was yielding to bias or prejudice. He therefore suggested the following amendment to the second sentence: "... judges must not yield to personal bias or prejudice ... ."

86. **Ms. Wedgwood** said that the foregoing proposal might imply that judges might have personal biases or prejudices so long as they disciplined themselves. If a judge had manifestly demonstrated prior bias or prejudice, that judge should be off the case. As bias and prejudice had a particularly invidious meaning within the realm of race, ethnicity and religion, the proposed wording would be too generous.

87. **Sir Nigel Rodley** said that the sentence might be amended to read: "First, judges must avoid personal bias or prejudice ... ."

88. **Mr. O'Flaherty** said that he fully appreciated the sensitive nature of the issues, and could accept Sir Nigel's amendment of his proposed amendment.

89. **Mr. Bhagwati** suggested the following wording: "First, judges must not allow their judgements to be influenced by personal bias or prejudice ... ."

90. **Mr. Kälin** said that he had sought guidance from the Bangalore Principles, but was unsuccessful. The Principles stated that: "A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds." The words "manifest" and "irrelevant grounds" raised problems. That had led him to the conclusion that the Committee should do its own drafting. He approved of the proposed text by Mr. Bhagwati.

91. **Ms. Chanet** said that the Bangalore Principles were not well drafted. The wording suggested by Sir Nigel and Mr. Bhagwati was an improvement. With respect to the words "the tribunal must also be seen to be impartial" in the third sentence, they constituted pious wishes, as only the manifestation of impartiality would be taken into account. The deepest convictions of the judges in question were not explored. Furthermore, the reference in footnote 31 to Communication No. 387/1989, *Karttunen v. Finland*, was somewhat limited, as it gave the impression that the notion of appearance, which was crucial for evaluating the impartiality of a judge, was limited to cases in which a judge should have been disqualified under domestic statutes. There was a large and sophisticated body of case law at the European Court of Human Rights on the notion of appearance. Therefore, it should be noted that the Communication reflected only one aspect of the appearance of impartiality and that the problem could be posed under many circumstances. The appearance of impartiality was a very important notion.

92. **Ms. Wedgwood** said that in the case of *Karttunen v. Finland*, the judge had clear financial and personal connections to one of the litigants and had stated repeatedly from the bench that one of the witnesses was lying. The last sentence of paragraph 22 seemed to imply, however, that any flaw under domestic law meant that impartiality was violated in the sense of article 14. Such a view excluded the possibility of harmless error. Nevertheless, as harmless errors did occur from time to time, she proposed that the last sentence should be removed.

93. **Sir Nigel Rodley** said that Ms. Wedgwood had a plausible and serious point. It was difficult, in formulating general comments, to make a position clear in principle while at the same time recognizing that the Committee could not draft new legislation. The Committee was not drafting new instruments. It was trying to give a sense of the scope and nature of existing obligations. He drew attention to the word "normally" in the last sentence, which permitted the Committee and States to realize that there would be *de minimis* or trivial situations where the impact on the trial might be non-existent.

94. **Mr. Bhagwati** said that the second part of the second sentence was causing him some anxiety, namely the words "and not act in ways that promote the interests of one of the parties to the detriment of the other". But a judgement rendered by a judge did in fact promote the interests of one of the parties to the detriment of the other. The question was whether the judgement was arrived at according to law or not.

95. **Ms. Chanet** said there had been a slight misunderstanding, perhaps caused by the brevity of the wording. What was meant was that the impartiality of the court had to be apparent. The issue in the Finnish case cited (*Karttunen v. Finland*) was not whether or not the judge had taken one side or the other, but whether or not he was perceived as having done so. If under domestic law the judge should have been disqualified, the reason would not have been partiality, but the appearance of partiality. Even if the judge had not in fact shown any partiality at all, he should have nonetheless been disqualified because of the appearance of partiality.

96. **Ms. Motoc** said that the axiom that justice must not only be done but must be seen to be done was a principle that had originated in English law but which was now very widely accepted, notably by the European Court of Human Rights and was of much wider application than the case cited, also covering issues of conflict of interest that might apply to a judge.

97. **Mr. Shearer** said that the important factor was a public perception that justice was being meted out impartially. He wondered whether the issue could be captured by wording such as "the tribunal must also be publicly perceived to be impartial".

98. He agreed with Mr. Bhagwati that a judgement did in fact promote the interests of one party over the other. Perhaps the word "improperly" should be added before "promote".

99. In response to the comment by Ms. Wedgwood, he suggested that the phrase "flawed by" could be replaced by "substantially affected by". He agreed with Sir Nigel that the word "normally" took care of *de minimis* cases.

100. **Ms. Motoc** wondered whether the first suggestion by Mr. Shearer ("must also be publicly perceived to be impartial") did not entail a risk of making the functioning of the courts subject to public opinion.

101. **The Chairperson** sought clarification of the concept of recusing a judge in the event of partiality. In many legal systems, recusal was strictly available to the parties, in order to request the removal of a judge because of partiality or incompetence. That was not the same as his dismissal by his superiors. In French, the term appeared to be "*écarté*" (removed), but removed by whom? The English term "disqualified" seemed to be equivalent to the French, but neither of those terms appeared to be equivalent to the Spanish "*recusación*".

102. **Ms. Chanet** confirmed that "disqualified" was equivalent to "*écarté*". She had used the term "recusation" which, as the Chairperson had said, related to a specific procedure open to the parties. The English term "disqualification" had a wider sense.

103. **The Chairperson** said that in Spanish, the concept of "recused" was "*recusado*", while the more general term for removal of a judge from the proceedings would be "*separado*".

104. **Mr. Kälin** noted that the Committee had already decided to accept Mr. Bhagwati's suggestion, namely, "judges must not allow their judgement to be influenced by personal bias or prejudice". He was also in favour of inserting "improperly" before "promote the interests of one party". In the next sentence, he had no strong feelings on the concept of the tribunal's having to be perceived to be impartial, although he had not understood Mr. Shearer's proposal as meaning that the functioning of the courts should be subordinate to public opinion.

105. The last sentence, as Ms. Chanet had indicated, had to do with perception. If domestic law stated that a judge should not have participated in the proceedings, then the perception would be that that tribunal had been affected by a problem of a lack of impartiality. That was a good principle, and he suggested that it could be captured by the wording "For instance, a trial substantially affected by the participation of a judge who under domestic statute should have been disqualified cannot normally be considered to be impartial".

106. He agreed with Ms. Chanet and the Chairperson that the Spanish version had to be changed, since "*recusación*" was too narrow a concept.

107. **Ms. Motoc** referred back to the Bangalore Principles, and suggested that the second sentence of paragraph 22 might begin with "It should appear to a reasonable observer that the judge ... ". She also suggested that the addition of a footnote referring to the principle from English law of "justice not only being done but being seen to be done".

108. *Paragraph 22, as orally amended, was approved.*

Paragraph 23

109. **Mr. O'Flaherty** suggested that the portion of the language dealing with customary courts should be placed in a separate paragraph. Customary courts were prevalent in many States, but the concept was more or less invisible in the paragraph as drafted.

110. The wording "The general applicability of article 14 also becomes relevant where courts based on customary law exist" was a very roundabout way of saying that article 14 applied to customary courts. In the last sentence, the phrase "if this is the case" was missing the key word "not".

111. **Sir Nigel Rodley** agreed that customary courts should be covered separately from military and special courts.

112. **Mr. Kälin**, speaking on a point of order, suggested that the matter of customary courts should be resolved first, before the Committee turned its attention to that of military courts.

113. **Sir Nigel Rodley**, speaking on a point of order, and subsequently supported by several Committee members, suggested that the topic of the customary courts should be left aside for the time being, and that the Committee should concentrate on the essential part of the paragraph, namely military courts.

114. In his view, the paragraph was a reasonable expression of the case law established thus far. What was interesting about it was that it did remind the Committee that its jurisprudence had evolved somewhat from the bare bones of comment No. 13. He wished to suggest a couple of amendments that might

help to flesh out that evolution. Firstly, he proposed adding the following sentence between the existing second and third sentences: "The need for resort to such courts can only be justified by reference to the existence of imperative considerations of necessity". The new sentence would apply to both military and special courts.

115. At the end of the following sentence, after the words "inconsistent with the fair, impartial and independent administration of justice", he proposed adding "even where a state of emergency has been declared". The addition would make it clear that the existence of a state of emergency itself did not necessarily justify recourse to military courts.

116. **Ms. Wedgwood** expressed agreement with both Sir Nigel's suggestions; however, she wished to raise two other points. Firstly, with regard to the sentence that read "The trial of military personnel before military tribunals should relate to offences of an exclusively military nature," she noted that under the Uniform Code of Military Justice, a soldier who committed a non-military offence while overseas — such as murder, in private circumstances while off-duty — would normally be prosecuted by the local jurisdiction, and, failing that, would be court-martialled. Thus there was a danger that the phrase "of an exclusively military nature" might exclude some offences that would, in fact, render the soldier liable to court martial.

117. Secondly, the third sentence dealing with the jurisdiction of military courts over civilians not performing military tasks posed a problem in the context of the Nuremberg trials. What had happened at Nuremberg had been a pooling of the authority of the several Allied militaries into a joint military commission, but each of them had been acting under the law of war in prosecuting war crimes, crimes against humanity and aggression. And in so doing, they had tried civilian personnel of the adversary. She took the point that the intention of the paragraph was directed against modern-day military tribunals that might seek, for example, to put civilian journalists on trial for sedition; however, she was trying to come up with language that would capture the extraordinary case of a war crimes trial during an armed conflict.

118. **Mr. Amor** said that the intent of the current evolution in jurisprudence was to set forth the viewpoint that a military court was not a priori a bad thing: everything depended on the guarantees that were offered and assured. The formulation that Mr. Kälin had proposed, in particular in the original third sentence, made provision for an evolution in jurisprudence without impeding further developments. He supported Sir Nigel's proposal to introduce the concept of necessity, even though the concept of necessity varied according to the circumstances of time and place and might evoke differing interpretations. The concept, however, was a valuable contribution to the text and at the same time restricted the possible scope of action of military courts.

119. **Mr. O'Flaherty** said that while he strongly supported both Sir Nigel's proposals, he nevertheless felt that the paragraph was trying to accomplish too much at once. On the one hand, it was dealing with regular military court jurisdiction, and on the other hand with the exceptional situation in which military courts prosecuted civilians. It would be more effective to consider the two issues separately.

120. **Mr. Shearer** also agreed with Sir Nigel's proposed amendments. Responding to Ms. Wedgwood's concerns about offences of an "exclusively military nature", he said that, under Australian law, an offence committed overseas would often be tried by the local jurisdiction, but if not, there was some discretion as to whether to bring it before an Australian civilian court or a military tribunal. Perhaps the difficulty could be resolved by modifying the phrase to read "offences committed in an exclusively military context".

121. **Ms. Chanet** did not agree with the position put forward by Ms. Wedgwood concerning the Nuremberg trials, because the Nuremberg Military Tribunal had been created by the London Agreement. Since it had been the result of an international agreement, it was not relevant to the present discussion.

The meeting rose at 6 p.m.

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Held at Headquarters, New York, on Friday, 23 March 2007, at 10 a.m.

Chairperson: Mr. Rivas Posada

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Draft general comment No. 32 on article 14 of the Covenant (*continued*)

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07-27971 (E)

The meeting was called to order at 10.05 a.m.

General comments of the Committee (*continued*)

Draft general comment No. 32 on article 14 of the Covenant (CCPR/C/GC/32/CRP.1/Rev.4) (*continued*)

Paragraph 23 (*continued*)

1. **Ms. Motoc** drew the Committee's attention to a text on military tribunals adopted by the International Commission of Jurists (ICJ) in 2006. Although it was not the Committee's practice to reproduce other bodies' texts, it was important to specify that military tribunals should not be able to try genocide, war crimes or crimes against humanity, as past experience had revealed that they did not always provide a fair trial. She wondered whether the other members would agree to insert such a reference in paragraph 23.

2. **Ms. Chanet** said that she preferred to keep the text as drafted by Mr. Kälin, i.e. with the word "normally", rather than take up Sir Nigel Rodley's suggestion from the Committee's previous discussion, which did not lay down specific conditions for the exceptional establishment of military tribunals for trying civilians; that was of some concern, especially in light of the Committee's general comment No. 29 on article 4.

3. **Ms. Wedgwood** observed that military tribunals were traditionally the place to try war crimes, as could be seen, for example, from article 84 of the Third Geneva Convention relative to the Treatment of Prisoners of War. She did not fully agree with the suggestion that the Nürnberg trials had been an example to the contrary, as suggested by Ms. Chanet during the previous day's discussion, because while the Nürnberg courts had been an international undertaking, they had nonetheless sat as military tribunals. Furthermore, the Nürnberg proceedings had not been held strictly for war personnel. The formulation in paragraph 23 was a little too exclusive because not only military personnel had been tried in military tribunals.

4. **Ms. Motoc** said that the state of necessity had to be further specified as it had more than one accepted definition in international law. The text should take into account general comment No. 29, paragraph 16, which stressed that even in a situation of armed conflict, the right to a fair trial was guaranteed under article 4 of the Covenant.

5. **Mr. Shearer** said he agreed that general comment No. 29 needed to be reflected in the current draft text, perhaps by way of a footnote on states of necessity. War crimes tribunals tended to be sui generis and did not necessarily come under article 14, but adding the phrase "or committed in an exclusively military context" to the end of the sentence beginning "The trial of military personnel" would cover that eventuality. Such a change would preserve the jurisdiction of courts martial in some countries in respect of offences that were not of an exclusively military nature.

6. **Mr. Amor** said that paragraph 23 could be made more specific without referring to states of necessity and suggested inserting, after the third sentence in the French text, the words "*Un civil ne devrait pas être jugé par un tribunal militaire à moins que l'administration de la justice par ce dernier procède d'une manière équitable, impartiale et indépendante, compte dûment tenu de l'observation générale n°29, lorsqu'il y a des circonstances exceptionnelles*". That text would cover a number of situations while avoiding a total break with the Committee's jurisprudence.

7. **Ms. Wedgwood**, responding to Ms. Motoc's point, said that a criticism of some codes of military justice, including that of her own country, was that they did not include references to genocide and crimes against humanity; instead, such crimes were tried as civilian crimes. The problem with stating that a military tribunal could try what were, in practice, war crimes, but could not try crimes against humanity or genocide, was that the definitions were always extremely technical. In fact, the advantage of crimes against humanity, from a strictly prosecutorial point of view, was that the nature or the state of armed conflict need not be debated: systematic abuses against civilians, even if they constituted a one-time event, could be considered crimes against humanity. The practice of the International Criminal Tribunal for the Former Yugoslavia was to group together the charges of war crimes, crimes against humanity and genocide, since separating one from the other was so difficult. It would be artificial to try to make such a distinction when the international tribunals themselves had felt it necessary to exercise discretion in how to charge a particular offence. International humanitarian law and the law of armed conflict had in a sense merged and

crimes against humanity were now part of the law of armed conflict.

8. **Ms. Chanet** said that if genocide or crimes against humanity had not been committed by military personnel, there was no reason to try them in a military tribunal. However, where war crimes were in question, crimes against humanity and genocide could be considered related crimes and therefore could be tried in military tribunals. She reiterated that the Nürnberg institutions, which were military tribunals set up to resolve an armed conflict within the framework of an international agreement, did not come under the Committee's draft general comment on article 14. Rather, the current draft aimed at improving on the previous general comment on article 14 (No. 13), which tolerated the establishment of military tribunals for any reason, with the proviso that they should observe the impartiality and independence stipulated by that article. In the context of a country neither at war nor in a situation of emergency, there was really no reason for the military to try non-military offences except where the State wished to impose its influence and considered military tribunals a way to find judges who would take decisions in its interest.

9. **Sir Nigel Rodley** said that trying civilians in military tribunals and trying military personnel for certain non-military offences were two issues that had to be kept separate. Military justice for military personnel did not fall under article 14, but rather was an issue of impunity; he therefore supported Mr. Shearer's suggestion of a footnote. The Committee should focus on the first issue, which required strong language, since it had more to do with ensuring justice than simply the right to a fair trial. Referring to imperative considerations of necessity, he said he would not be against modifying the formulation he had proposed previously. His point, however, was that only very exceptional circumstances allowed for special courts or military courts to have jurisdiction over civilians or for jurisdiction to be taken out of the hands of the ordinary courts because they could not deliver justice. Unless the Committee considered that military tribunals should not have jurisdiction over any civilian matter, in which case a simple reference to general comment No. 29 would suffice, the text should be amended to make it clear that there should be a heavy burden of proof on States parties to justify a departure from the course of ordinary civilian justice.

10. **Mr. Amor** said that he was concerned about the jurisdiction of certain special courts, such as the *Cour de sureté*, which tried offences involving national security. While there were legitimate concerns about that sort of case being tried by military tribunals, civilian tribunals could easily become embroiled in politics in such circumstances, and in the end suffer just as much from lack of credibility as military tribunals. The *Cours de sureté* were characterized by political influence and had a history of injustice and unfairness. Therefore, military tribunals should deal with military personnel, but in special cases, or in a case involving both military personnel and civilians as co-defendants, military tribunals should be allowed to conduct the hearing, with the proviso that they should observe the conditions set out in article 14 and, in exceptional circumstances, those laid down in the Committee's general comment No. 29 on article 4.

11. **Mr. O'Flaherty** said that while he understood the reasons for the language used to deal with the issue that military personnel should be tried only in military courts and in respect of military offences, and the desire to avoid impunity, the resulting sentence had given rise to legitimate concerns, as expressed by Ms. Chanet and Mr. Shearer. Given the prevalence of military law practice around the world, the sentence as it stood was misleading and inappropriate. Rather than being covered by a footnote, impunity should be addressed by an additional phrase to the effect that military courts in dealing with military personnel should concern themselves primarily with military offences, and at no time could any invocation of military law result in a consequence of impunity.

12. He disagreed with the view that establishing a military court and then making it compliant with article 14 was sufficient to legitimize it for the trying of civilians. The onus should be on the State to demonstrate the exceptional nature of the circumstances, which should be specifically relevant to the category of case at issue.

13. **Sir Nigel Rodley** said that there were cases where military justice was actually to be preferred to the jurisdiction of special civilian courts. The advantage of the latter, however, was that, because of their openness, it could be ascertained whether they were impartial and independent, whereas military courts were camouflaged. It was also easier to identify the political dimensions of non-military jurisdiction. He proposed that two or more stages of exceptionality

should be implicitly recognized. In the first stage, the procedures of ordinary criminal courts would be modified, so as to allow, for instance, evidence obtained through wiretapping. In the second stage, protection would be provided for special courts where there was a risk of intimidation of jurors. The wording of the paragraph should allow for such a gradation in departing from ordinary justice, with military justice representing the extreme limit of such a departure.

14. **Ms. Chanet** stressed that the State should justify a decision not to have recourse to a civilian court and that such a decision would not be acceptable when taken in order to circumvent the requirements of article 14; it would need to be appraised case by case. The onus of proof lay with the State.

15. **Ms. Wedgwood** noted a new tendency, which was taken into account by the wording of paragraph 23, to outsource military tasks to civilian contractors. In practice, however, no good way had been found of ensuring the necessary fairness and independence of military courts in trial proceedings against such persons, who often operated far from their country of origin. New ways needed to be found of trying such persons, adapted to the practical difficulties of the situation. She also cautioned against the danger of military courts wrongly criminalizing certain acts, for instance by labelling free speech as seditious libel.

16. **Ms. Palm** concurred with the comments regarding the exceptional nature of the trial of civilians by military courts. Stronger wording was required, so that States would not only have a burden of proof but would also have to invoke imperative reasons. She also pointed to the possibility of semi-military courts and wondered whether that might be covered by paragraph 23.

17. **Mr. O'Flaherty** emphasized that impunity was not an article 14 issue. He agreed with Sir Nigel Rodley's suggestion as to a gradation of exceptionality but feared that it would make for complexity in the drafting. Paragraph 24 included elements relevant to such a gradation process.

18. **Ms. Motoc** said that even where there was a state of necessity, principles had to be established that were also applicable to military courts.

19. **Mr. Kälin**, speaking as rapporteur for the draft general comment on article 14, said that while there was a consensus on parts of paragraph 23, there remained some points that required clarification before any alternative wording could be proposed. On the issue, in particular, of the trial of military personnel by non-military courts, he doubted that the addition of a footnote, in order to refer to a matter that he recognized to come outside the scope of article 14, would make for greater clarity. One solution might be to delete the last sentence of the paragraph.

20. A further question to be resolved was whether military courts should be able to deal with cases of crimes against humanity and genocide. He agreed that they were particularly well placed to try war crimes since they were better able to determine military necessity; however, it was not always easy to draw a line between such crimes and crimes against humanity. It might therefore be better not to make any reference to different categories of international crime.

21. He noted the existence of general agreement on the trial by military courts of civilians performing military tasks, as in the case of the Nürnberg military tribunals, where such persons had been considered part of the war machine. The Committee might wish to insert in paragraph 23, after the words "not performing military tasks", a phrase along the lines of "or otherwise intimately linked to the armed forces".

22. It also seemed to be agreed that the use of the word "normally" in that paragraph meant that there were exceptions: it remained to be determined what they were. Everyone recognized that in situations where article 4 could be invoked (derogation in time of public emergency), there could be an exception to the rule of civilians not being tried by a military court. Then there were what Sir Nigel Rodley had referred to as imperative considerations of necessity, which left open the question of when such cases would not be covered by article 4 and whether they necessitated the creation of a new category of semi-derogations. The third possible exception was the trial of civilians by military courts that would give every guarantee of impartiality and independence. However, that amounted to a requirement rather than an exception.

23. **The Chairperson** invited the members of the Committee to comment on the three possible exceptions to the limitations to the jurisdiction of military courts over civilians.

24. **Ms. Chanet** said that she agreed with the article 4 exception. On the second question, expansion of the text along the lines proposed was fraught with dangers.

As for the suggestion that the third case of exception would create a new category of derogation, article 4 already allowed for such derogations: where military courts were deemed admissible, under circumstances specified by the State, they were still required to comply with article 14.

25. **Sir Nigel Rodley** expressed concern that in the wording remaining after the suggested deletion the impunity dimension would not be taken into account. He suggested the addition of a phrase along the lines of "bearing in mind risks to impunity". He said that rather than seeking to create what Mr. Kälin had identified as a new category of semi-derogations, he would prefer a reference to article 4. If no mention was made of derogation, then necessity must be invoked as a way of ensuring a buffer between ordinary and extraordinary justice. He trusted that the paragraph would still explicitly rule out the jurisdiction of military courts over civilians.

26. **Ms. Wedgwood** said that the addition to the third sentence proposed by Mr. Kälin was too vague and suggested instead "or who have committed crimes arising in an armed conflict". In cases of armed conflict abroad, article 4 would apply; in cases of military occupation, the need for security did not overrule the requirements of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.

27. **Mr. Amor** said that the Committee should not try to be too ambitious by trying to take into account all possible situations. Even in a purely military context, the fundamental principles of justice and article 14 should apply. The situation of civilians performing military tasks, or paramilitary groups, or armed militias in an internal conflict, was a grey zone and should be left out. Trial of a civilian before a military court might be acceptable in exceptional circumstances, but articles 4 and 14 and the Committee's general comment No. 29 would still apply.

28. **Ms. Motoc** said she was in favour of a strict interpretation of article 14 and agreed that it should be explicitly stated that military courts must be impartial and independent and observe the same principles of justice as civilian courts. She also believed there should be some reference to the need to avoid impunity. A reference could also be added at the end of the paragraph to underscore the need for military judges to be independent of the military hierarchy, which would provide a link with the following paragraph on "faceless judges". With regard to the trial of civilians by a military court, she suggested the Committee might wish to study the work of the ICJ on that subject.

29. **Mr. Shearer** said he took note of the comment by Ms. Wedgwood concerning the administration of justice in occupied territories pursuant to the Fourth Geneva Convention, but felt such situations fell under the heading of *lex specialis*, specifically the law of armed conflict; perhaps a footnote could be added to say the paragraph did not apply to situations of armed conflict. In any case, he suggested that further discussion of paragraph 23 should be deferred pending submission of a new draft by the rapporteur.

30. **Ms. Palm** said that the basic question was whether or not to allow military courts to try civilians solely in the context of a derogation pursuant to article 4, or whether some other exceptional circumstances could also exist. In principle she would prefer only the article 4 derogation but could conceive of the need to envisage other possibilities. In any case, she agreed with Mr. Shearer that the Committee should defer further consideration of the paragraph pending submission of a new text by the rapporteur.

31. **Mr. Iwasawa** said that he was in favour of deleting the fourth sentence of the draft referring to ordinary crimes committed by military personnel. With regard to civilians performing military tasks, he preferred the formulation proposed by Ms. Wedgwood.

32. **Mr. O'Flaherty**, in response to Ms. Palm, expressed concern that limiting the right of military courts to try civilians to a derogation pursuant to article 4 might in fact encourage States to declare a state of emergency.

33. **Mr. Johnson** said that both military personnel having committed a common law offence and civilians having committed an offence of a military nature should be tried before a civilian court. He recalled that the Committee had dealt with that very issue recently when considering the fifth periodic report of Chile and had underscored the need to avoid exceptions to that principle.

34. **Ms. Motoc** noted that the Committee had not yet discussed the issue of courts based on customary law.

35. **Mr. Kälin** said he would like the Committee to discuss the issue of customary courts before trying to

draft a proposal on the subject. He suggested that a new paragraph dealing with customary courts should be inserted between paragraphs 23 and 24, or perhaps elsewhere in the draft comment.

36. **Mr. O'Flaherty** suggested that the Committee should first go on to discuss paragraph 24 and then return to the issue of customary courts later, with a new paragraph to be inserted elsewhere in the text.

37. **The Chairperson** said he took it that the Committee wished to defer further discussion of paragraph 23.

Paragraph 24

38. **Mr. Amor** said that there were situations, which had been recognized by the Committee in its jurisprudence, where the use of "faceless judges" could be justified by the need to avoid intimidation and threats which could affect judicial decisions. The central problem was whether or not there was some mechanism to provide guarantees of the independence and impartiality of the judges in question. Accordingly, he suggested the insertion, at the end of the first sentence of the French text, of the words "*dont l'identité et le statut ne sont pas vérifiés par une autorité indépendante*". That would imply that the use of "faceless judges" could be acceptable in extraordinary circumstances.

39. **Mr. Shearer** said Mr. Amor's suggestion was a very practical one. He also suggested that, in the second sentence, the word "often" should be inserted before the verb "suffer". Those two changes would reinforce the idea that the use of "faceless judges" was acceptable only in extreme circumstances and provided that all other guarantees of a fair trial were maintained, the independent authority entrusted with the task of vetting the judges could be an Ombudsman for example.

40. **Mr. O'Flaherty** agreed with the proposed amendments but said that the paragraph should stress that the use of "faceless judges" was acceptable only in truly extraordinary circumstances and that the State party must justify the use of such a measure. It should also be clear that any of the irregularities mentioned in the paragraph, whether or not in the context of a court with "faceless judges" would in and of themselves constitute a violation of the Covenant.

41. **Ms. Wedgwood** agreed with the amendment suggested by Mr. Amor. She also pointed out that in some cases jurors too could be subjected to pressure or intimidation and might be anonymous, for example identified only by numbers, and she therefore wondered whether the text should also refer to jurors.

42. **Sir Nigel Rodley** said the position of the Committee had always been to consider recourse to "faceless judges" as acceptable only in truly exceptional cases; in the past when it had found that there had been a violation of the Covenant, there had been other circumstances besides the use of "faceless judges" per se. That was what was implied by the words "in circumstances such as these" in the last sentence. With regard to the suggestion made by Mr. Amor, while he was in favour of making the text as clear as possible, the issue of the independence of the judges involved not only their status, but factors such as whether they were offered incentives and who chose them, for example the executive or the judiciary, and that could not be solved solely by reference to an independent authority confirming their status. He believed the Committee should avoid the impression of, as it were, giving advice on how to make the use of "faceless judges" acceptable. He agreed with the addition suggested by Mr. Shearer, but otherwise believed the text should stand as drafted, implying that the use of "faceless judges" might be possible but referring to the Committee's past experience where the use of "faceless judges" had been associated with unacceptable practices.

43. **The Chairperson**, speaking as a member of the Committee, said that the issue of the anonymity of the judges must be differentiated from the irregularities listed in the second sentence of the paragraph. The Committee's jurisprudence made it apparent that it was the existence of other irregularities in proceedings presided by "faceless judges", not just the fact that the judges were anonymous, that had led to a finding of a violation of the Covenant. The second sentence should be redrafted to make that distinction clearer. The Committee's jurisprudence was based on cases involving the use of "faceless judges" in both Peru and Colombia; he pointed out that such courts no longer existed in those countries, having subsequently been found to be unconstitutional by the respective Supreme Courts, based largely on the Committee's finding of a lack of fundamental guarantees for a fair trial pursuant to article 14.

44. **Ms. Chanet** said that the Committee's jurisprudence was somewhat ambiguous, since it did not condemn special tribunals of "faceless judges" as such, but rather drew attention to the other procedural irregularities that tended to undermine their legitimacy. To be as clear as possible about the circumstances in which "faceless judges" might be acceptable, she felt that the reference to satisfying the basic standards of fair trial, contained in the last sentence of paragraph 24, would suffice.

45. **Mr. Kälin** agreed that the procedural irregularities listed in the second sentence of paragraph 24 were not necessarily attributable to the fact that the tribunals in question were composed of "faceless judges". He therefore proposed inserting the word "often" between the words "but also" and "from".

46. He was hesitant to embark upon a discussion of the specific circumstances in which "faceless judges" might be acceptable because he felt that paragraph 24, in its current form, remained within the scope of the Committee's jurisprudence and left room for future developments. For the same reason, he was also against referring to exceptional cases.

47. Regarding the proposal put forward by Mr. O'Flaherty, he said that the remainder of the draft general comment made it abundantly clear that all the procedural irregularities listed in paragraph 24 were, in and of themselves, violations of article 14 of the Covenant, even in cases where the judges were not "faceless". With respect to Ms. Wedgwood's remarks, he was not opposed to including a reference to jurors, given that they might also need protection from threats and intimidation.

48. **Ms. Wedgwood** said that she would be happy to propose language on jurors. Referring to the term "irregularities" in the second sentence, she pointed out that, in certain circumstances, "irregular" could be taken to mean "unlawful". Accordingly, in order to avoid creating the impression that special tribunals of "faceless judges" were always unlawful, she suggested deleting the word "other".

49. **Ms. Chanet** said that she was opposed to including a reference to jurors, particularly since the Committee had not dealt with any cases of "faceless" juries. Jury service was voluntary in some countries, and therefore individuals with specific grievances could volunteer to serve and then take advantage of their anonymity to pursue their own agendas. If no personal information on jurors was provided, it would be impossible to ascertain whether they were impartial and therefore fit to serve.

50. **Ms. Wedgwood** said that there might have been a misunderstanding regarding the use of the term "faceless". Jurors were never totally anonymous — they were subject to selection interviews and were present and visible during the proceedings — but it was possible to protect them by keeping their personal details (name and address) secret. In response to Ms. Chanet's remarks, she said that she was not aware of any legal system in which potential jurors could volunteer. She also pointed out that in common-law systems the jury was responsible for ruling on matters of fact.

51. **The Chairperson** pointed out that the Spanish phrase "*jueces sin rostro*" was not an official term; the formal name was "*jueces especiales*" or "*jueces excepcionales*".

52. **Mr. Amor** recalled that two separate issues had been raised in connection with paragraph 24: first, how to determine the identity and status of "faceless judges" and, secondly, how to eliminate the procedural irregularities that tended to hamper the pursuit of justice, even when the judges involved were fully identifiable.

53. **Sir Nigel Rodley** remarked that drawing up a list of criteria intended to guarantee the independence and impartiality of "faceless judges" would be a lengthy and difficult task and might even be counterproductive, since States might use that list as the basis for selecting such judges. While paragraph 24 and the Committee's jurisprudence implicitly allowed for the use of special tribunals of "faceless judges", attempts to codify the circumstances in which such arrangements were permissible would be ill-advised.

54. He took issue with Ms. Wedgwood's proposal to delete the word "other" because, for him, the term "irregularities" meant abnormal activities, not unlawful ones. Furthermore, he was strongly opposed to introducing a reference to anonymous juries, particularly since, at least in the United Kingdom, jurors were selected at random and maintained a quasi-anonymous status. It was not necessary to legislate for a situation which, to his knowledge, had never arisen.

55. **Ms. Wedgwood** pointed out that all the procedural irregularities listed in the second sentence

were, in principle as well as in practice, never justifiable. In that context, the term "irregular" could certainly be taken to mean unlawful; deleting the word "other" would disassociate the procedural irregularities from the use of "faceless judges", thereby allowing for situations in which the use of such judges might be permissible. The draft general comment should set out principles, rather than facts, and should not therefore merely summarize the Committee's jurisprudence.

56. **The Chairperson** pointed out that the Committee's jurisprudence relating to "faceless judges" dealt with cases from only two countries, neither of which used a jury system. Accordingly, it might not be appropriate to mention jurors in paragraph 24.

57. **Mr. Iwasawa** said he was in favour of Ms. Wedgwood's proposal to delete the word "other" and of excluding any reference to jurors.

58. **Mr. Bhagwati** wondered whether the list of irregularities in the second sentence should be retained, particularly since most of them could not be justified under any circumstances.

59. **Mr. Kälin** proposed, by way of a compromise, deleting both the word "other" and the comma directly following the word "irregularities" from the second sentence, to leave the phrase "but also from irregularities such as ...". He took the view that the list of irregularities in the second half of that sentence should be retained because it sent a strong message about the unacceptable nature of such procedures. Lastly, he proposed incorporating Mr. Amor's suggestion into the last sentence of the paragraph, which would read: "Tribunals of 'faceless judges', in circumstances such as these and if the identity and status of such judges have not been ascertained by independent authorities, do not satisfy basic standards ...".

60. *Paragraph 24, as amended, was adopted.*

61. **The Chairperson** said that the Committee would discuss the issue of customary courts at a later date.

62. **Mr. Glélé Ahanhanzo**, supported by **Ms. Chanet** and **Mr. Amor**, pointed out that the draft general comment failed to address the essential question of who was responsible for safeguarding the independence of the judiciary.

63. **Mr. Kälin** said that a reference to safeguarding the independence of the judiciary could be incorporated into paragraph 17 of the draft. He would consult with Mr. Glélé Ahanhanzo on appropriate wording.

The meeting rose at 12.55 p.m.